

**G. Wes Limited Company and Environment Technology of Fort Wayne, Inc.<sup>1</sup> and Joseph Gray.**  
Case 8–CA–22907

October 13, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On February 28, 1992, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondents filed exceptions and supporting briefs, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>4</sup>

<sup>1</sup> The caption is amended to reflect the correct name of Respondent Environment Technology of Fort Wayne, Inc.

<sup>2</sup> We find no merit in Respondent Environment Technology's argument regarding certain allegations in the General Counsel's posthearing brief. The Respondent states that the General Counsel's brief, which alleges that the unfair labor practices occurred on July 10, 1990, failed to conform with the allegation contained in the complaint, which alleges that the unfair labor practices occurred "on or about July 11, 1990." The judge found the unfair labor practices occurred on July 10. The Respondent complains that it was prejudiced and would have adduced other evidence had it been on notice of the precise date that was at issue. We reject this argument, as the complaint allegation that the unfair labor practices occurred "on or about July 11, 1990" put the Respondents on notice of the timeframe involved, and there is no dispute that the Respondents at hearing were fully apprised of and litigated the incident at issue. See *Haynes Satellite Co.*, 136 NLRB 95, 98 (1962), enf. denied on other grounds 310 F.2d 844 (6th Cir. 1962).

<sup>3</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In finding that Environment Technology unlawfully refused to hire employee Leo Saahir for antiunion reasons, we do not rely on the judge's finding that no union members were hired during the picketing.

In the first sentence of the second paragraph of the section of the judge's decision entitled "The Dismissal of Joseph Gray," the date "July 11" should be "July 17."

<sup>4</sup> We affirm the judge's findings that Environment Technology violated the Act by interrogating employees Gray and Saahir and refusing to hire Saahir. In providing a remedy for Environment Technology's refusal to hire Saahir, we shall correct the judge's failure to provide for backpay to be computed in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall order Environment Technology to remove any reference from its files to the refusal to hire Saahir and to notify him in writing that this has been done.

1. The judge found that Respondents G. Wes Limited Company (G. Wes) and Environment Technology of Fort Wayne, Inc. (Environment Technology) are joint employers and therefore jointly liable for the unfair labor practices found. We disagree.

Separate entities will be found to constitute joint employers for purposes of the Act where one entity shares or codetermines those matters governing the terms and conditions of employment of the other entity's employees, such as hiring, firing, discipline, supervision, and direction. *Laerco Transportation & Warehouse*, 269 NLRB 324, 325 (1984). Applying that test here, we conclude that Environment Technology does not exercise sufficient control over the terms and conditions of employment of G. Wes' employees to support a joint employer finding.

There is no dispute that the employers are separate entities, with separate financial control and separate management. Further, each employer determines for itself the wage and benefit package it pays to its respective employees. They maintain separate payroll records, and they pay worker's insurance, worker's compensation, and unemployment compensation funds separately. G. Wes contracts with other general contractors to supply labor for asbestos removal.

We find further that the evidence fails to establish that either Respondent exercises control over the other's employees with regard to hiring, firing, or discipline. With regard to hiring, the evidence indicates that each Respondent conducts separate interviews of job applicants and makes separate hiring decisions without contacting the other. The subcontract between Respondents provides that Environment Technology has no right to reject any employee hired by G. Wes and that Environment Technology cannot request laborers by name.<sup>5</sup>

There is no evidence that either Respondent ever disciplined employees of the other. As noted above, the subcontracting agreement between the Respondents does not allow Environment Technology to terminate any G. Wes employee. The judge nevertheless found that Environment Technology fired G. Wes employee Joseph Gray. Contrary to the judge, we find no evidence to indicate that Environment Technology Supervisor May made any determination to terminate Gray or that he recommended to Ileogben that Gray be

<sup>5</sup> The judge cited one instance in which Environment Technology interviewed an employee, Richard Poe, who later became a G. Wes employee. Environment Technology excepts to the introduction of evidence pertaining to this incident on the basis that it occurred 3 months after the alleged unfair labor practice.

Assuming the evidence is properly admissible, we do not believe that one isolated incident occurring 3 months after the alleged unfair labor practice is proof that Environment Technology controlled G. Wes' hiring. See *International Shipping Assn.*, 297 NLRB 1059, 1067 (1990).

fired.<sup>6</sup> Rather, G. Wes' vice president, Pius Ileogben, decided to fire Gray after receiving information from May that Gray showed up intoxicated at the jobsite before his starting date. Ileogben later discussed the matter with G. Wes' president, Gail Wesley, and another G. Wes manager.<sup>7</sup>

Although Environment Technology supervisors supervised G. Wes employees onsite on a day-to-day basis, we find that the evidence concerning the extent of the supervision is insufficient to establish a joint employer relationship.<sup>8</sup> The evidence shows that the employees in question were trained and certified asbestos abatement workers. There is no record evidence showing that the supervisors instructed G. Wes employees specifically how to do the work or the manner in which they were to perform the assigned tasks. The limited evidence in the record concerning the supervision of asbestos abatement workers consisted of testimony by the supervisor of another employer's asbestos abatement project, who stated that such workers were told what areas were to be worked and with whom the employees were to work, and the work was then left to the employees to perform.<sup>9</sup> The General Counsel thus has failed to adduce specific evidence to establish that Environment Technology's supervision was anything but limited and routine in nature. As the Board has stated, "[M]erely routine directions of where to do a job rather than how to do the job and the manner in which to perform the work" are insufficient to support a joint employer finding. *Island Creek Coal Co.*, 279 NLRB 858, 864 (1986).

We conclude that the absence of G. Wes supervision onsite and the oversight of the project by Environment Technology supervisors does not warrant a finding that Environment Technology was a joint employer of the workers furnished by G. Wes to perform the asbestos removal.

Accordingly, in the absence of evidence that hiring, firing, processing of grievances, administration and negotiation of contracts, granting of vacations or leaves of absence, or discipline were determined jointly by the Respondents, the General Counsel has failed to es-

tablish that G. Wes and Environment Technology share or codetermine the essential terms and conditions of employment of the employees. We therefore reverse the judge's finding of joint employer status.

2. The judge, based on his joint employer finding, concluded that G. Wes was liable for Environment Technology Supervisor May's unlawful interrogations of Gray and Saahir and refusal to hire Saahir. Having reversed the judge's joint employer finding, we find no basis for concluding that G. Wes was liable for Environment Technology's unlawful acts. We also note that G. Wes was not even alleged in the complaint to have been liable for May's refusal to hire Saahir.

The judge also found that Environment Technology, through Supervisor May, terminated G. Wes employee Gray because he was a union member. He found G. Wes jointly liable for the discharge, based again on his finding that Environment Technology and G. Wes were joint employers. Having reversed the judge's joint employer finding and his finding that Environment Technology fired Gray,<sup>10</sup> and because there is no evidence that May was acting for G. Wes or that G. Wes' decision to terminate Gray was independently motivated by antiunion reasons, we find no basis for concluding that G. Wes violated the Act by discharging Gray.

Accordingly, all allegations against G. Wes are dismissed.

#### CONCLUSIONS OF LAW

1. By coercively interrogating employees about their union affiliations, Respondent Environment Technology has violated Section 8(a)(1) of the Act.

2. By refusing to hire an applicant for employment because of his union affiliation, Respondent Environment Technology has discriminated against the applicant in violation of Section 8(a)(3) and (1) of the Act.

#### ORDER

The National Labor Relations Board orders that Respondent, Environment Technology of Fort Wayne, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>6</sup> Accordingly, we shall reverse the judge's finding that Environment Technology violated Sec. 8(a)(3) by terminating Gray.

<sup>7</sup> That Ileogben did not investigate the report as to Gray's condition does not establish that the decision to terminate was made by May. What is significant is that it was Ileogben who determined that the conduct as reported was serious enough to warrant discharge.

<sup>8</sup> We attach no significance to the fact that G. Wes employees occasionally called Environment Technology instead of G. Wes when reporting that they were going to be absent for the day, as it is expected that employees would inform their onsite supervisor whether they would be appearing for work. We further note that there is no evidence Environment Technology granted or denied leave to any G. Wes employee.

<sup>9</sup> The only other evidence consisted of Environment Technology Supervisor May's testimony that he oversaw the job and "was there to get the job done as best and as good and as fast as possible."

<sup>10</sup> We cannot conclude that Environment Technology caused or attempted to cause G. Wes to fire Gray for antiunion reasons. The complaint did not allege and the parties did not litigate this theory. Cf. *International Shipping Assn.*, 297 NLRB 1059 at 1059 (1990) (where employer found not to be a joint employer of discriminatees, Board held that employer was not liable for refusing to employ or offer reemployment to discriminatees, but was liable for attempting to cause and causing another employer to refuse to hire them, a matter clearly encompassed by the complaint and fully litigated). We further find no basis for the judge's unexplained conclusion that Environment Technology was independently liable for Gray's discharge, even if no joint employer status were found.

(a) Unlawfully interrogating employees and prospective employees or applicants for employment about their union affiliation.

(b) Discriminatorily refusing to hire an applicant for employment because of his union affiliation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Leo Saahir immediate and full employment which he would have enjoyed if he were not rejected on the Polsky job in July 1990 or, if such position no longer exists, to a substantially equivalent position without prejudice to seniority or any other rights or privileges that he would have enjoyed, and make him whole for any loss of earnings and other benefits suffered by reason of the discrimination against him, with interest.

(b) Expunge from its records any reference to the refusal to hire Saahir for employment in July 1990, and notify him in writing that this has been done and that evidence of the unlawful conduct will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully interrogate employees and prospective employees or applicants for employment about their union affiliation.

WE WILL NOT discriminatorily refuse to hire an applicant for employment because of his union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Leo Saahir immediate and full employment which he would have enjoyed if he were not rejected on the Polsky job in July 1990 or, if such position no longer exists, to a substantially equivalent position without prejudice to seniority or other rights or privileges he would have enjoyed, and make him whole for any loss of earnings and other benefits suffered by reason of the discrimination against him, with interest.

WE WILL remove from our records any reference to our refusal to hire Saahir for employment in July 1990, and notify Saahir in writing that this has been done and that evidence of the unlawful conduct will not be used as a basis for future personnel actions against him.

ENVIRONMENT TECHNOLOGY OF FORT  
WAYNE, INC.

*Susan E. Fernandez, Esq.*, for the General Counsel.  
*John Holcomb, Esq. and Keith Praytel, Esq. (Millisar & Nihil)*, of Cleveland, Ohio.

## DECISION

### STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A charge of unfair labor practices was filed on July 30, 1990, by Joseph Gray, an individual (Gray or the Charging Party),

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

against G. Wes Limited Company (Respondent G. Wes Limited) and Environmental Technology of Fort Wayne, Inc. (Respondent Environmental Technology).

In essence the complaint alleges that Respondent G. Wes Limited and Respondent Environmental Technology are joint employers, and that by interrogating an applicant for employment concerning his union membership and activities, Respondents, as joint Respondents, interfered with, restrained, and coerced employees for employment in the exercise of rights guaranteed them in Section 7, in violation of Section 8(a)(1) of the Act; that by refusing to hire an applicant-employee for employment because the applicant-employee joined, supported, or assisted the Union, and engaged in other concerted activities, the Respondents have interfered with, restrained, and coerced applicant-employees in the exercise of rights guaranteed in Section 7, in violation of Section 8(a)(1) of the Act, that by refusing to hire an employee because he is a member of the Union Respondents have discriminated against an applicant for employment, in violation of Section 8(a)(1) and (3) of the Act; and that by terminating the employment of the Charging Party because he joined, supported, or assisted the Union and engaged in other concerted activities for purposes of collective bargaining and mutual aid or protection, and discouraging membership in the Union, Respondents have discriminated against the Charging Party in violation of Section 8(a)(1) and (3) of the Act.

Respondent Environmental Technology filed an answer to the complaint on November 13, 1990, and Respondent G. Wes Limited filed an answer on November 28, 1990, respectively, denying that either has engaged in unfair labor practices as set forth in the complaint.

The hearing in the above matter was held before me on April 11 and 12, 1991, in Akron, Ohio. Respondent G. Wes Limited has elected to proceed without legal representation in this proceeding. Briefs have been received from counsel for the General Counsel and counsel for Respondent Environmental Technology and from Respondent G. Wes Limited, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses, and my consideration of the briefs filed by the respective representatives, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

At all times material, Respondent G. Wes Limited is an Ohio corporation with its principal office and place of business in Columbus, Ohio, where it is engaged in providing labor to entities engaged in asbestos removal.

In the course and conduct of its business operations, Respondent G. Wes Limited annually provides services valued in excess of \$50,000 to other enterprises located within the State of Ohio, which are engaged in commerce on other than an indirect basis.

Since the complaint alleges that G. Wes Limited annually provides services valued in excess of \$50,000 to other enterprises located within the State of Ohio, which are engaged in commerce on other than an indirect basis, and Respondent G. Wes Limited does not specifically deny such facts, but simply denies the allegation because it is without information sufficient to form a belief as to the truth of the remainder

of the allegation, I find that Respondent G. Wes Limited is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

At all times material Respondent Environmental Technology is and has been an Indiana corporation with its principal office in Fort Wayne, Indiana, where it is engaged in asbestos removal, including removal of asbestos from buildings located in Akron, Ohio.

In the course and conduct of its business operations, Respondent Environmental Technology annually purchases goods and materials valued in excess of \$50,000 directly from points located outside the States of Indiana and Ohio, and receives those goods and materials at its facilities in the State of Indiana and its State of Ohio jobsites.

The complaint alleges, the answer admits, and I find that Respondent G. Wes Limited is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges that the International Laborers Union, Local 894 (the Union) is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

In its answer, G. Wes Limited denied the allegation that the Union is a labor organization simply because it is without information sufficient to form a belief as to the truth of the allegation.

Respondent Environmental Technology filed an answer, denying the allegation that the Union is a labor organization simply because it is without information sufficient to form a belief as to the truth of the allegation.

At the hearing Kenneth C. Holland, business manager of the International Laborers Union, Local 894 for the past 2 years, testified that employees attend and participate in union meetings and engage in picketing activity; that the Union deals with employers concerning employee grievances, labor disputed; that the Union negotiates contracts on behalf of the employees; and that on July 5, 1990, 35 or 40 pickets of his organization picketed Respondent Environmental Technology at the Polsky project, Akron, Ohio, until an injunction reducing the number of pickets was issued by the court July 18, 1990. All picketing activity ceased around July 28, 1990.

After the court's order on July 18, 1990, less pickets were limited to picket at the entrances to the parking lot. The petition for the injunction was filed solely by Environmental Technology.

Based on the foregoing uncontroverted and credited testimony of the Union's business agent and the legal action taken by Environmental Technology, I find that the International Laborers Union, Local 894 (the Union) is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background Facts

The complaint alleges that Respondent G. Wes Limited (G. Wes) and Respondent Environmental Technology (Environmental Tech) are joint employers and that they jointly violated the Act by: (1) interrogating employees and applicants for employment about their union affiliation; (2) that

Respondents discriminated against an applicant by refusing to hire him because he was a member of the Union; and (3) Respondents discriminated against an employee by discharging him because of his membership in the Union.

*B. The Business Operating Relationship of Respondent G. Wes and Respondent Environmental Tech*

The complaint alleges that Respondent G. Wes and Respondent Environmental Tech are joint employers. Both Respondents deny they are joint employers and both maintain that they are separate and independently operated entities. Notwithstanding, since both Respondents entered into a business arrangement for the removal of asbestos on the Polsky project in Akron, Ohio, wherein Environmental Tech is the contractor on the jobsite and G. Wes is the subcontractor, furnishing some of the laborers to do the job, their relationship in carrying out the contractual-subcontractual obligations will be examined for joint employer status.

*Hiring Manpower for the Polsky Job*

In hiring laborers for the Polsky job, Pius Ileogben of G. Wes, interviewed Frankie Walker in the spring of 1990 at Columbus, Ohio. Pius interviewed Walker again at a hotel in Akron, Ohio, on July 9, 1990. After Walker presented his certificate and medical report, Pius told Walker he was hired and furnished him with a mask-respirator.

Walker started to work July 16, 1990, on the day shift. Two weeks later he testified he told his night supervisor he was a member of the Union. Two weeks thereafter he was switched to the night shift where he worked under the supervision of Phil May, and sometimes Bob Lowe of Environmental Tech. Walker was furnished with wirecutters, scaffolds, ladders, hammers, crowbars, and asbestos bags by Environmental Tech.

Mark Fuller applied for a job on the Polsky project at G. Wes in Columbus, Ohio, in May 1990. Pius, of G. Wes, interviewed him and told him he was hired. Fuller accepted the position but did not report for work because he found other work. Nevertheless, Fuller testified that during the interview with Pius, the latter asked him was he in the Union. Pius did not deny he asked Fuller was he in the Union and Fuller's certificate indicates it was issued by Ohio Laborers Training and Upgrading Trust Fund and Fuller had presented his certificate to Pius.

Subsequently, Fuller applied for the Polsky job at Environmental Tech in Akron, Ohio. He talked with Project Supervisor Ed May on several occasions. Eventually, in August 1990, Ed May hired him and Fuller presented his certificate and evidence of medical examination. His certificate of training was issued by Ohio Laborers Training and Upgrading Trust Fund. Another worker was hired on the Polsky job the next day by Pius of G. Wes.

Paul DeBose, a member of the Union, was interviewed for the Polsky job in Akron by Supervisor Ed May October 10 or 15, 1990. DeBose testified he was not asked anything about his union affiliation although he presented his certificate to Supervisor May, which indicates it was issued by Ohio Laborers Training and Upgrading Trust Fund.

DeBose testified without dispute that 2 days after he was on the job (December 1 or 2), Environmental Tech's legal counsel, John Holcomb, Esq., asked him about his attitude

and also whether the Employer was fair to union workers. He replied, "yes," and Holcomb asked him if he would testify in the upcoming (instant) Board proceeding. DeBose said he told Holcomb he did not think he (DeBose), as a union member, should volunteer to testify but he would appear if he were subpoenaed. Holcomb did not suggest what he should testify about. The charge in this proceeding had been filed since July 30, 1990, and the complaint was issued October 31, 1990.

Holcomb, who represents Respondent Environmental Tech in this proceeding, did not testify or deny that he held the above-described conversation with DeBose. Since I was persuaded by the demeanor of DeBose that he was testifying truthfully, I credit his undisputed account.

Richard Poe was interviewed at the Polsky jobsite by Environmental Tech's supervisor, Ed May, and he started to work October 6, 1990. Poe gave his certificate to May, which indicates it was issued to Poe by Ohio Laborers Training and Upgrading Trust Fund. Poe testified he did not speak with Pius of G. Wes. However, he said he received his W-2 form at the end of the year from G. Wes. Poe's pay records bear the name G. Wes, who paid him. (G.C. Exhs. 2a-j). Project Supervisor Ed May admitted he interviewed Richard Poe but testified Poe was hired by G. Wes. May's testimony in this regard is consistent with G. Wes' pay records and Poe's testimony about his W-2 form.

Richard Poe further testified that he is a member of the Union but that he did not so inform Supervisor May and the latter did not ask him about his union affiliation. He said he worked under the supervision of Bob Adams of Environmental Tech, and he worked until March 11, 1991, when the Polsky job was completed. He acknowledged some laborers were laid off prior to him because the job was winding down, and that some of those laborers laid off were non-union.

Finally, Poe testified that during his last week on the job (March 2), Supervisor Ed May asked him if he would testify in the instant case on behalf of G. Wes, by whom Poe understood he was employed. His testimony is not denied by May and having been persuaded by the demeanor of Poe, I credit his testimony.

Brian McKnight was interviewed in October or November 1990 at the Polsky jobsite by Environmental Tech's project supervisor, Ed May. Also present was someone named Tom, of Environmental Tech. McKnight is a member of the Union. He testified that although Ed May saw his certificate showing it was issued by Ohio Laborers Training and Upgrading Trust Fund, he did not ask him about his union affiliation and he was hired and worked under the supervision of Bob Adams.

McKnight testified that on his first day on the job he had a conversation with Supervisor Ed May and Tom as follows (Tr. 84-85):

A. Well, we met downstairs, I was saying to Ed May and Tom, the job supervisor, they said Dick Poe and Fred would work with G. Wes and I would be working for them, E. T. I would be making less money, that the \$3.00 would go into a fund. And I said, Well I'd rather work for G. Wes because I'd rather not work for this fund, and they said, well, it's like money in the bank because you'll receive your money in 30 days after the

job. Well, they lied to me. I haven't got my money yet. It takes six weeks to find out—six months to get my money and they're taking \$200 for secretarial fees or something like that.

Q. So actually we did not—G. Wes Limited did not have anything to do with U.S. on that job?

A. No E.T.

McKnight further testified that a portion of his wages was to be deducted as a contribution to the pension fund. On his second day on the job he was laid off because he was unaware his certification had expired. He was recertified and when he returned to the job, Tom asked to see his certification and he presented it (ET Exh. 11) to him. It is noted that McKnight's old and new certification (ET Exh. 11) does indicate they were issued by "Ohio Laborers Training and Upgrading Trust Fund." McKnight said he had no dealings with G. Wes.

The Union, Local 894 commenced picketing the Polsky project on July 5, until July 28, 1990.

#### The Alleged Discriminatees

Joe Gray, a member of the Union, was interviewed for a job on the Polsky project by Pius at G. Wes, Columbus, Ohio, in the spring of 1990. He showed his certification and medical report to Pius and filled out an application for employment. Pius tentatively assured Gray a job. About 8 weeks later (early July), Gray received a letter from Pius of G. Wes, inquiring about his (Gray's) availability. Gray responded in person for an interview by Pius in a hotel in Akron, Ohio. Pius hired and issued Gray and two other laborers, respirators for which each of them signed. In a letter dated July 8, 1990, Gray was advised by Pius to report for work at Polsky on July 16, 1990, at 4 p.m.

Meanwhile, in April or May 1990, laborer Leo Saahir inquired of G. Wes about employment on the Polsky project. Respondent G. Wes sent Saahir an application which he completed and returned to G. Wes. In late June or early July 1990, G. Wes sent a letter to Saahir for an interview in Talmadge, Ohio. Saahir was interviewed there by Pius of G. Wes, but Saahir was not offered employment.

In late June and early July 1990, both Joseph Gray and Leo Saahir were working (asbestos removal) for Safety Environmental Energy Group at a Fairlawn Elementary School jobsite in Akron. Gray and Saahir testified that Gray had heard from other workers that they were still hiring at Polsky. Gray was already scheduled to report to work at Polsky July 16, and Saahir had not been offered employment there. Because union pickets were at the Polsky project and Saahir had not been offered a job there, Gray suggested he and Saahir go to Polsky during their lunch period, so he (Gray) could see what if any gate he should enter on July 16, and Saahir could inquire about obtaining employment there.<sup>1</sup>

On July 10, 1990, with Saahir driving his car, Gray and Saahir left their Fairlawn school jobsite at 12 noon and drove to the Polsky project where they had to park a block or two

away. When they arrived at the Polsky entrance, they saw two men and a security guard. They asked to see the supervisor, and Ed May of Environmental Tech identified himself. Saahir testified that he asked Supervisor May if he was hiring and he handed May his credentials. May asked him (Saahir) did he belong to the Union and Saahir said, "Yes, but I do non-union jobs." While returning Saahir's credentials to him (Saahir), Saahir testified Supervisor May asked him if he was presently a member of the Union. Saahir replied, "Yes," and May said, "Well we don't hire Union members." He said he asked why not and May said because the Union is picketing them (Environmental Tech). May added, but "if you so desire, you can call our main office." Saahir said he did not call the main office because he knows from experience that if the foreman doesn't want you on the job you're not going to be hired.

Joseph Gray testified he heard May tell Saahir Environmental Tech was not doing anymore hiring. Otherwise, Gray's testimony essentially corroborates Saahir's.

Thereafter, May told Gray who heard only parts of his conversation with Saahir, to come into the Polsky door. When Gray came out, Saahir said he and Gray left and returned to work.

Joseph (Joe) Gray testified he approached the Polsky door and told the security guard he worked there. Ed May came over to Gray's location immediately and Gray told May his name and that he was employed by G. Wes. Gray said May asked him did he belong to the Union and he said, "Yes but he did not think that was a problem, because he worked on Union and non-union jobs." Gray did not present his certification or medical report, probably because he was not reporting to work that day (July 10 or 11). May took Gray's name, told him he would check it out, and went into his trailer office a few feet away. Saahir was not immediately close enough to hear the latter conversation with Supervisor May. Gray said he and Saahir left the Polsky jobsite.<sup>2</sup>

With respect to the July Polsky visit by Gray and Saahir, Project Supervisor Ed May testified that when Gray told him he was supposed to work for him, he smelled alcohol on Gray, who was acting very happy. He said he went into the trailer to check on Gray, and he called G. Wes because, for safety, they did not want anyone who was high on the job. Gray did not have his paperwork (credentials) to present to May so May called G. Wes and told Pius Gray reported to work with no credentials and apparently intoxicated, and Pius told May not to put Gray to work. May denied he had any conversation with Saahir or that the latter had ever asked him for work.

Also in a letter to the investigator in the instant case, Pius of G. Wes Limited advised the investigator that on July 11, 1990, G. Wes representative on the Polsky job (Supervisor May) called his Columbus office to verify whether Joe Gray was an employee of G. Wes; and that Gray was reported staggering and unable to conduct himself in a gentleman like manner, with heavy "alcohol breath."

As scheduled, Gray reported for work at Polsky July 16 and a representative for Environmental Tech stopped him and advised him he could not work at Polsky, took Gray's respirator, and told him to call G. Wes Limited. When no

<sup>1</sup> The above-corroborated evidence is essentially uncontroverted and I credit it because I was persuaded by the demeanor of Gray and Saahir that they were telling the truth, and there is no reason to discredit them.

<sup>2</sup> The above testimonial account of Gray and Saahir is essentially corroborated, each by the other.

one called Gray that day, Gray called G. Wes the next day. At that time, Gray asked Pius what happened to the Polsky job. Pius told him he had been informed that he (Gray) and another jobseeker had reported to Polsky intoxicated with a bad attitude and were not wanted on the jobsite. Both Gray and Saahir denied they were intoxicated or that either of them had been drinking alcohol. Saahir said he is of the Islam faith which forbids drinking, and he has not drank alcohol in 20 years. He said he has never seen Gray drunk or using drugs.

Supervisor May denied he had any conversation with Saahir and he specifically denied he asked Saahir was he in the Union and Saahir said, "yes he was"; or that he told Saahir "we're not hiring Union people because the Union is picketing the Polsky project."

Supervisor May also denied he asked Gray was he a union man, but acknowledged he wrote down Gray's name and called Pius of G. Wes, and told him Gray reported for work without work papers and appeared to be intoxicated.

In support of Supervisor May's contention that Gray appeared intoxicated and ungently when he and Saahir visited Polsky in July, Respondent presented the following witnesses:

Officer Jeffrey Newman of the University of Athens Police Department testified he was present when Joe Gray and Leo Saahir visited the Polsky job entrance. He testified he told them unless they had business there they had to move along because they had some trouble there with pickets. He suspected they were under the influence of alcohol from an odor of alcohol he thought he smelled. However, he said after Gray and Saahir talked with Supervisor Ed May, they left the project.

John W. Stachowiak, University of Akron Police Department, testified that he was on duty when Gray and Saahir visited the Polsky project in July and saw those two black men at the corner of High and Center Streets. They appeared happy and were boisterous—happy-go-lucky. He passed them and as he continued his route around the building, a white male shouted to his friends, "Hey, hey, I think those two black guys took my wallet." The General Counsel objected at this juncture, but I overruled him in order to receive the whole, seemingly unrelated, story and allow counsel for Respondent an opportunity to establish an evidentiary connection.

Officer Stachowiak said he simply looked at the white male who he thought might have approached or called him to complain. Instead, the white male, with his companion, looked at him and continued on their way. He did not talk to the two black males and said he did not smell alcohol on them nor see them staggering.

I find all of Officer Stachowiak's testimony speculative without probative substance, and failing to establish any relevant connection to the testimony and issues in this case. In fact his testimony failed to establish any wrongdoing on the part of Gray or Saahir.

John Finkbeiner, architect for the State of Ohio overseeing compliance of the plans on the Polsky job, testified that he was present when Gray and Saahir visited the Polsky project.

It is particularly noted that Finkbeiner is the first and only witness who described the efforts of Gray and Saahir to enter the Polsky entrance as confrontational with the security officer and Supervisor Ed May. It is especially noted that neither

Supervisor May nor Officer Newman described Gray and Saahir's efforts to enter the project as a commotion or confrontational. The credited evidence shows that both men (Gray and Saahir) had an uncontroverted, valid, earnest, and understandable interest to see the job supervisor (May), in an effort to obtain work for Saahir and for Gray to observe the scope of the picketing activity in progress. Both Officer Newman and Supervisor May testified that, although Gray and Saahir tried to enter the project, they were stopped by Officers Newman and/or Stachowiak without any forceful or resisting conduct, and they complied with the officers' orders.

Finkbeiner acknowledged he was not a part of the conversation between Gray and May and Saahir and, admittedly, did not hear all the conversation. He failed to show that he was near enough to Gray or Saahir to be able to smell alcohol and he did not testify he smelled alcohol on them.<sup>3</sup>

With respect to the testimony of Officer Newman regarding a wallet, Gray testified that it was after leaving Polsky, on their way back to Saahir's car, not on their way to Polsky, that he saw a wallet on the ground which he picked up and handed to a guy who he thought dropped it. Saahir testified he remembers Gray picking up the wallet and giving it to a guy who he said had dropped it. The guy accepted the wallet.

Gray denied he drinks or was drinking alcohol on the day or the night before he and Saahir went to the Polsky project. He said he has not drank since he was treated for drug and alcohol abuse a few years ago. Leo Saahir testified that he nor Gray had been drinking; that he is of the Islam faith which forbids drinking, and he has not drank alcohol spirits in 20 years.

The General Counsel presented a witness, in the person of George Pappas, project manager of the Safe Environmental Group, an enterprise engaged in asbestos removal. Pappas testified that in July 1990 Safe Environmental Group was involved in a job in public schools in Akron, Ohio. Both Joe Gray and Leo Saahir worked on that job under his supervision. Payroll records on that job show that Gray and Saahir worked full time July 9–15, 1990.

Pappas said he was on the job and supervised Gray and Saahir daily July 9 through 12, 1990. He said at no time did he ever observe behavior by Gray or Saahir which appeared as either of them was intoxicated or under the influence of drugs. He further testified he has seen other workers wearing the mask who appeared intoxicated, and they had to remove the mask and check out because they said they were ill, which he interpreted as being unable to breathe properly because of not having recovered from intoxication.

The payroll records also show that on July 10, 1990, Gray and Saahir were 30 minutes late returning from lunch and were docked for 30 minutes. Pappas' testimony and these records support Gray and Saahir's testimony that they went

<sup>3</sup>I was persuaded by the obvious exaggeration and the demeanor of Finkbeiner that his testimony was not objective and truthful, and I discredited his description of the incident that Gray and Saahir had created a commotional confrontation effort and that they appeared to be intoxicated. He mentioned his concern about the ongoing picketing and the possibility of it disrupting the job work. Perhaps his concern explains his exaggeration of the efforts of Gray and Saahir to see Supervisor May. No other witness characterized the incident as a confrontation or a commotion.

to Polsky and talked to Ed May on July 10, 1990. I credit their testimony in this regard because the payroll records corroborate it. Pappas testified that Gray and Saahir were working in either the boiler room or the crawl space that day. Although he was within conversational distance of each of them that afternoon, he said he did not smell any alcohol on either of them, and did not note anything unusual about their behavior, such as slurred speech, after they returned from lunch. He said he has known Saahir and Gray in a working capacity on other jobs over a period of 5 years, and has never known or suspected either of them to be under the influence of alcohol or drugs.

As I observed Gray, Saahir, and particularly Pappas testify, I was persuaded by their demeanor that they were testifying truthfully about the sobriety of Gray and Saahir on the day the latter workers visited Supervisor May at the Polsky jobsite. I therefore credit their testimony and discredit the unsupported suspicions about their sobriety by Supervisor May, Officer Newman, Officer Stachowiak, or Architect Finkbeiner.

Consequently, based on the foregoing credited evidence, I find that neither Joe Gray nor Leo Saahir was intoxicated or under the influence of alcohol or other drugs when they visited Supervisor May at the Polsky project.

#### Gray's Crimes of Theft and Fraud

Finally, Respondent introduced into the record the criminal record of indictments and convictions of Joe Gray, with respect to various crimes of fraud, theft, as well as his past use of alcohol and drugs. Presumably, such evidence was submitted by Respondent to challenge the credibility of Joe Gray, with respect to his testimony that Supervisor May asked Gray and Saahir were they members of the Union; May telling Saahir Respondent Environmental Tech was not hiring anymore workers, or any more union members; and denying that Gray or Saahir were intoxicated or under the influence of alcohol when they visited supervisor May at the Polsky jobsite.

However, while the authenticity of the criminal record of Gray is not questioned, I have considered it, and I nevertheless credit Saahir and Gray's account not only because I was persuaded by their demeanor that they were testifying truthfully in this regard, but also because Gray's account is corroborated by Saahir who has no such criminal record. Additionally, Gray's account regarding intoxication is also supported by the credited and corroborated account of Pappas and other circumstantial evidence of record. Because the accounts of Gray and Saahir are credited, perhaps the question is raised why would Respondent Environmental Tech (May) contend that Gray and Saahir were intoxicated, were under the influence of alcohol, and ungentlemanly when they went to the Polsky job July 10. In this regard, I find that it may be reasonably and logically inferred from the credited evidence of record that such contentions were contrived by Supervisor May as a defense to the unfair labor practice charges filed July 30, with the hope of concealing any possible finding that his real reason for not allowing Gray to work and not hiring Saahir was because of their union membership and the ongoing picketing at the jobsite by Gray and Saahir's Union. May was apprised of their union affiliation when, in response to May's question, they acknowledged they were members of the Union. Moreover, May saw

Saahir's certification which indicated he was a union member.

It may also be asked why would such a conclusion be drawn or a finding made when the evidence of record shows that Respondents Environmental Tech and G. Wes hired and had in their employ on July 10 and 11, union and nonunion employees. While the evidence of record does not specifically answer this question, I am persuaded that the evidence is sufficient to logically conclude and find, as I do, that Respondent Environmental Tech did not want to hire anymore union workers on the jobsite while the Union was picketing the Polsky jobsite. The picketing was in progress at the Polsky project from July 5 to July 28, 1990.

#### Questions

Two questions raised by the foregoing evidence are whether (1) Project Supervisor Ed May asked Gray and Saahir about their union affiliation during their July 10 visit to the project, and (2) Ed May told Saahir he (Environmental Tech) was not hiring union people because the Union was picketing the Polsky job.

#### Conclusions

Supervisor May denied he asked Gray and Saahir about their union affiliation, or that he told Saahir Respondent Environmental Tech was not hiring any union people because the Union was picketing the job. In evaluating the credibility of Gray, Saahir, and May, it is noted that neither of Respondents' witnesses (Officer Newman, Officer Stachowiak, nor Architect Finkbeiner) testified they overheard all or any conflicting parts of the conversation May had with Gray and/or Saahir. However, Saahir testified he told May he understood May was hiring and handed May his certificate, etc., and May asked him was he a union member. Gray corroborated Saahir's testimony in this regard. When Saahir said, "Yes, but I perform non-union jobs," May asked, "Are you still in the Union?" and Saahir said, "Yes." May then told him "well, we don't hire Union members because the Union is picketing the job site." Gray only heard May add, Respondent Environmental Tech was not doing anymore hiring. Saahir's account is essentially corroborated by Gray and May's account is not corroborated and I credit the corroborated accounts of Gray and Saahir.

It is also noted that one of the reasons Gray and Saahir went to Polsky during their lunch hour on July 10 was to try to get Saahir employed on the Polsky job. I find it difficult to conceive of Gray, and especially Saahir, reporting to Polsky intoxicated under the circumstances. After all, they had just left work for Safety Environmental Group, and both were intending, and did in fact return to work, even though they were 30 minutes late in doing so. However, even their late return to work is understandable, considering the distance they explained they had to go to get to Polsky and return, for which late return records show they were docked 30 minutes. Perhaps even more persuasive evidence that Gray and Saahir were not drinking or under the influence of alcohol is the credited testimony of their supervisor at Safety Environmental Group, George Pappas.

Supervisor Pappas testified he saw Gray and Saahir at close range before and immediately after lunch. He categorically denied detecting any evidence (odor or behavior) of al-

cohol or use of substance abuse by either worker not only on that day, but throughout their 4- or-5 year work history on other jobs.<sup>4</sup>

With respect to May's assertion that Gray and/or Saahir were drinking, were intoxicated, or were under the influence of alcohol, it is particularly noted that none of May's (Respondent Environmental Tech) witnesses actually corroborated or supported May's assertion in this regard. More specifically, Officer Newman simply testified that he suspected Gray and Saahir were under the influence of alcohol which he thought he smelled. Newman did not offer any reasons or other evidence to support his suspicion or what he thought he smelled.

Officer Stachowiak testified he did not smell alcohol on Gray or Saahir and he did not see them staggering.

Architect Finkbeiner testified that he did not get close enough to Gray or Saahir to smell their breath and he did not see them staggering as they walked.

Based on the foregoing credited testimony of George Pappas, the nonsupporting testimony of Respondent Environmental Tech's witnesses, Newman, Stachowiak, and Finkbeiner, I credit the corroborated testimony of Joseph Gray and Leo Saahir that they were not intoxicated or under the influence of alcohol or drugs when they went to Polsky in July. Correspondingly, I discredit Supervisor May's testimony that either worker was in fact intoxicated or drinking alcohol. Further, I find the above-credited testimony that Supervisor Ed May did in fact ask Gray and Saahir whether they were members of the Union; and that Supervisor May told Saahir he (Respondent Environmental Tech) was not hiring members of the Union.

Further supporting the above credibility resolutions that Supervisor Ed May was not telling the truth when he told Saahir Respondent Environmental Tech was not hiring union members is the obvious analytical and rational reason why May told Saahir Respondent was not hiring union members, and why it did not hire Saahir. In this regard, May could have simply told Saahir there were no openings or he was not hiring. May probably did not tell Saahir that because it was not in fact the truth, as Gray had previously heard he was hiring. According to the uncontroverted and credited testimony of Mark Fuller, Fuller was hired 2 or 3 weeks later, in August 1990, and an employee named John, hired a day later. Also, according to records and testimony, Richard Poe was hired October 6, 1990.

In all probability, Respondent Environmental Tech (May) was hiring on July 10 or preparing to hire within a few weeks, since it actually hired laborers a few weeks after Saahir's July 10 visit to Supervisor May. Moreover, I was persuaded by the demeanor of Saahir and Gray that they were testifying truthfully that May asked them were they members of the Union and that May told Saahir he was not hiring union members. Also, it may be reasonably inferred from any delay in May's (Environmental Tech's) hiring union members between July 10 and 30, that such delay was

purposely avoided because the union picketing of the Polsky project continued in progress until about July 28, 1990.

It is particularly noted that the charge in the instant case was filed July 30, 1990, and Respondent hired Mark Fuller a few days after termination of the picketing on August 6, 1990.

Environmental Tech (May) hired Mark Fuller, a known member of the Union, who May testified had worked for him on prior jobs. Fuller's hiring was followed by the hiring of union members Richard Poe on October 6 and Brian McKnight in late October or early November 1990. Under these circumstances, it may be reasonably inferred from such actions by May, and I find, that May (Environmental Tech) hired union members, Fuller, Poe, and McKnight after the unfair labor practice charge was filed, to make it appear that Respondent was not discriminating against union members. Such action by Respondent, however, is not convincing in the face of the fact that no union members were hired during the picketing by the Union (July 5-28, 1990), even though Saahir applied for work July 10 (during the picketing) and was told union members were not being hired because the Union was picketing the job.

Additionally, Joe Gray, who had in fact been hired and was to start work July 16, 1990, was terminated on that date by Supervisor May in collaboration with Supervisor Pius of G. Wes. I further find that it is clearly established by more than a fair preponderance of the evidence, that Supervisor May's rejection of Saahir and the termination of Gray by May and Pius were actions consistent with what May had told Saahir on July 10, that Respondent Environmental Tech was not hiring union members because the Union was picketing the job.

Based on the foregoing credited evidence, I find that Supervisor May interrogated Joe Gray and Leo Saahir about their union affiliation during their visit to the Polsky project on July 10. Because Gray was already employed on the job and May was his supervisor, I find May's interrogation of Gray was coercive, especially because May was asking the question because the Union was picketing the job and, as later found, *infra*, May did not want to hire anymore union members while the picketing was in progress.

Although Saahir was not yet employed by either Respondent on July 10, I nevertheless find that Supervisor May's interrogation was coercive because Saahir was applying for employment at the time, and May interrogated him in order to reject him if he were in fact a member of the Union. May did not want to hire any more union affiliated workers on the job because, as he explained to Saahir, the Union was picketing Respondent Environmental Tech.

Under these circumstances, I find that Supervisor May's interrogation of Gray and Saahir was in violation of Section 8(a)(1) of the Act. *Lassen Community Hospital*, 278 NLRB 370, 374 (1986).

Based on the foregoing evidence, I find that Respondent Environmental Tech (May), taking it at its word, refused to hire Saahir and in fact terminated the employment of Gray, because they were members of the Union and their Union was picketing the Polsky job at the time. Because Supervisor May's conduct was taken because Saahir and Gray were union members, it was discriminatory and in violation of Section 8(a)(1) and (3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

<sup>4</sup>I fully credit George Pappas' testimony because he is a disinterested third party in the outcome of this dispute, and I was persuaded by his demeanor that he was testifying truthfully. His account is consistent with the corroborated and consistent testimony of Gray and Saahir and I credit them and discredit Supervisor May's uncorroborated and unsubstantiated assertion.

### The Dismissal of Joseph Gray

Respondent Environmental Tech's supervisor, May, said he took Joe Gray's respirator and declined to put him to work when Gray reported to the jobsite July 16 because after he called Pius of G. Wes on the day of Gray and Saahir's visit (July 10), he told Pius Gray was there claiming work without work papers and was getting intoxicated.

Gray testified that when he called Pius the next day July 11 and asked him why was his Polsky job terminated, Pius told him he had been informed by Supervisor May that Gray and Saahir had reported to the jobsite intoxicated, with a bad attitude, and they were not wanted on the job. When Pius was asked during this proceeding why was Gray terminated, Pius said "misconduct on the job site (July 10 or 11) was one reason, because Gray should not have been at Polsky before July 16, and he could not be trusted in the work area." Pius admitted he did not contact Gray to learn Gray's version of what transpired at the jobsite on July 10.

However, it has been found herein that neither Gray nor Saahir had been drinking or was intoxicated when they saw May at the Polsky project.

### *C. Whether Respondent Environmental Technology Possessed Sufficient Control over the Employees Supplied to It by Respondent G. Wes Limited to Constitute the two Entities a Joint Employer*

The compliant alleges that Respondent G. Wes Limited and Respondent Environmental Technology are joint employers.

In this regard the evidence of record is without dispute that at all times material, Respondent Environmental Technology is and has been, an Indiana corporation with its principal office in Fort Wayne, Indiana, where it is engaged in the removal of asbestos from buildings in various locations, including the Polsky project in Akron, Ohio.

The same record evidence shows Respondent G. Wes Limited is an Ohio corporation with its principal office in Columbus, Ohio, where it is engaged in the business of providing labor to entities engaged in asbestos removal, such as Respondent Environmental Technology.

Respondent G. Wes Limited has admitted that at all times material, the following named persons have occupied the position set forth opposite their respective names: Gayle Wesley, president and director; Pius Ilegoben, vice president and director and project manager.

Likewise Respondent Environmental Technology admitted that at all times material, the following named person occupied the position set forth opposite his name: Edward (Ed) May, project supervisor.

Otherwise, however, both Respondents deny the supervisory status of the persons who occupy the positions which each has acknowledged occupies the position opposite his or her respective name. Notwithstanding, the uncontroverted evidence shows that Gayle Wesley is president and director of G. Wes Limited, and that both Pius Ilegoben and Edward (Ed) May hire and fire employees; and that May gives directions and work assignments to employees on the job, as well as permission to report late and leave early. By Gayle Wesley holding the position she holds as head of G. Wes Limited, and the indicia of authority to hire and fire, admittedly exercised by Pius Ilegoben and Ed May, I conclude and find

that Gayle Wesley, Ilegoben, and May are supervisors within the meaning of Section 2(11) of the Act. *Guarbo Lacey Mills*, 249 NLRB 658 (1980); *Gatliff Business Products*, 276 NLRB 543, 555 (1985).

As counsel for the Respondent argues, in determining joint employer status, the Board has recognized the separateness of two legal entities and the fact that there is arm's-length business transactions between them. However, it nonetheless examines the business relationship of the two entities to determine whether one entity exercises sufficient control over the employees of the other, to the extent that it meaningfully affects matters relating to the employment relationship, as hiring, firing, discipline, supervision, and other conditions subject to mandatory collective bargaining. *Laerco Transportation*, 269 NLRB 324, 325 (1984); *United States Steel Corp.*, 270 NLRB 1318, 1319 (1984).

In the instant case, pursuant to law, neither Respondent G. Wes nor Respondent Environmental Tech may hire laborers for asbestos removal unless each laborer has and presents a required current certificate for such removal, and a written statement that he or she has successfully completed a physical examination. The certificate frequently indicates the laborer's Union affiliation.

Pursuant to the terms of the subcontracting agreement between Respondent G. Wes and Respondent Environmental Tech, Respondent G. Wes has the authority to hire and fire the laborers it supplies to the general contractor on the job (here, Respondent Environmental Tech), and provide the employees with a respirator. However, the laborers supplied by Respondent G. Wes take orders and directions from the supervisors of the general contractor on the job (Respondent Environmental Tech) (G.C. Exh. 8).

Also pursuant to the Respondents' agreement the laborers employed by G. Wes are to call G. Wes to report their absences, although the G. Wes employees did not always call and report their absences to G. Wes. However, G. Wes' manager (Pius) called Environmental Tech's job supervisor (Ed May) at 8:30 every morning and supervisor May would inform G. Wes of any absences of G. Wes employees. On the Polsky job, Respondent G. Wes paid health benefits pursuant to the prevailing wage statute on employees it furnished Respondent Environmental Tech, but G. Wes employees could not purchase such insurance.

G. Wes paid workmen's compensation for the employees it hired and made a direct cash benefit to them for a pension plan. G. Wes also paid the matching FICA contributions on its employees wages. It paid the health care provider (Riverside Physicians Center) for its employees who resided in Columbus, Ohio, but employees who resided in Akron, Ohio, could select their own health care, and G. Wes would reimburse them or the provider for physical examinations. G. Wes also paid for retraining its employees.

Correspondingly, Respondent Environmental Tech also subcontracted with AES on the Polsky job and AES employees could purchase health insurance through AES. Environmental Tech's employees also had a retirement plan whereby \$3 went into the plan for every hour the employee worked.

Respondent Environmental Tech paid the matching FICA contributions and workmen's compensation premiums on its employees. Respondent G. Wes employees could not participate in any of Environmental Tech's employee's benefits.

Pursuant to the terms of the subcontractual arrangement with G. Wes, Environmental Tech did not possess the right to reject laborers hired by G. Wes. Nor could Environmental Tech terminate the employment of employees hired by G. Wes.

Environmental Tech did not contact, discuss, or consult with G. Wes prior to filing for the court injunction on July 20, 1990, against the union pickets at the Polsky jobsite.

Without consulting with each other, both Respondent G. Wes and Respondent Environmental Tech responded independently to the charge in the instant proceeding.

#### Conclusion

Examination and analysis of the relations of the business operations between Respondent G. Wes and Respondent Environmental Tech revealed the following evidence:

The record shows that Respondent G. Wes is an Ohio corporation with its principal place of business in Columbus, Ohio.

Respondent Environmental Tech is an Indiana corporation with its principal office in Fort Wayne, Indiana. Both corporations have separate management and ownership, and are in fact separate entities.

The evidence further shows that the two entities (G. Wes and Environmental Tech) are engaged in the same business of asbestos removal from buildings, and that they entered into a subcontractual arrangement whereby G. Wes, as subcontractor would supply laborers to Environmental Tech, contractor, for removal of asbestos on the Polsky project job in Akron, Ohio. The law recognizes separate entities entering into such business relationships but in the event of a labor relations dispute, it will examine their operations to determine to what extent they share or co-determine those matters governing the essential terms and conditions of employment. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *NLRB v. Browning Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981).

If it is factually determined by the Board or the courts that one employer (entity) possesses sufficient indicia of control over the employees of the other employer (entity), which meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction, and other conditions subject to mandatory collective-bargaining, joint employer status will be found. *Laerco Transportation*, 269 NLRB 324, 325 (1984); *United States Steel Corp.*, 270 NLRB 1318, 1319 (1984).

In the instant case, Respondent Environmental Tech possesses the authority and does in fact supervise the employees of G. Wes limited as well as Environmental Tech's employees. The subcontractual arrangement between the two entities, provides that Respondent Environmental Tech does not possess the authority to reject laborers hired by G. Wes; and that Environmental Tech does not possess the authority to terminate the employment of employees hired by G. Wes.

However, the record evidence shows that there has been some interchange or usurpation of authority between the two entities with respect to one entity interviewing and hiring, and to a lesser extent, one entity rejecting and terminating the employment of employees of the other. More specifically, the evidence shows that laborers Frankie Walker and Joseph Gray were interviewed and hired for the Polsky job by Pius of G. Wes in Columbus, Ohio. Mark Fuller, Paul

DeBose, and Brian McKnight were interviewed, hired, and actually employed by Supervisor Ed May of Environmental Tech, at the Polsky job in Akron, Ohio. All the above interviews and hirings were carried out in accordance with the subcontractual arrangement.

Interestingly, however, is the fact that Richard Poe was interviewed and hired by Supervisor Ed May of Environmental Tech at the Polsky job in Akron, Ohio, but was actually employed and paid by Pius of G. Wes in Columbus, Ohio. The latter interviewing and hiring action by Supervisor Ed May (Environmental Tech) suggests that, in practice, he actually possessed such authority, or that he was the authorized or ratified agent of Respondent G. Wes to interview and hire Poe on behalf of Respondent G. Wes, who employed Poe.

Equally interesting is the fact that discriminatee Joe Gray was interviewed twice, hired, and given work equipment (respirator) by Pius of G. Wes, Columbus, Ohio.

However, when Joe Gray reported for work at Polsky July 16, as scheduled, his respirator was taken from him by Supervisor Ed May (whom Pius referred to as G. Wes' representative on the job) and told by May he could not work (dismissed), and directed to call Pius of G. Wes in Columbus. When Gray called Pius and asked what happened to the Polsky job, Pius told Gray he had been informed by May that he (Gray) and another jobseeker had reported to the job (July 10) with a bad attitude, intoxicated, acting ungentlemanly, and they were not wanted on the job. It is particularly noted that Gray was not scheduled to report to work at Polsky until July 16, and Pius was well aware of that fact. Moreover, it was Pius who approved the date (July 16) for Gray to report to the Polsky job. It is therefore clear that Pius knew Gray was not reporting to the jobsite to go to work on July 10. In all probability that is why Gray did not have his work papers (certificate and medical report) to present to May.

It is also especially noted that Pius did not ask Gray if he was intoxicated and ungentlemanly when he went to the jobsite on July 10. Nor did Pius ask Gray why he was there on July 10 instead of July 16, or what was his version of what transpired with Supervisor May during his visit on July 10. Under these circumstances, I find that Supervisor Pius' lack of inquiry and concern about ascertaining the facts about what transpired at the Polsky jobsite on July 10 clearly and reasonably implies, and I find, that Supervisor Ed May either had the authority from past practice or direction from Pius to take Gray's respirator (which was given to him by Pius), and to terminate his employment; or that Supervisor May usurped the authority and terminated Gray's employment with G. Wes, and that Pius of G. Wes subsequently ratified Ed May's action. In either such event, I find that Supervisor Ed May had the authority to terminate Gray on behalf of G. Wes and that May's actions meaningfully affected matters relating to the employment relationship of Gray, directing, supervising, and firing him. *Laerco Transportation*, supra; *United States Steel Corp.*, supra.

Consequently, when Supervisor Ed May's subcontractual authority to assign work, direct work, grant early departure, and daily supervision of G. Wes' and Environmental Tech's employees is considered in conjunction with Ed May's authority to interview and hire Richard Poe for employment with G. Wes, and his authority to take Gray's respirator

(given to him by G. Wes) and to dismiss Gray or terminate his employment with G. Wes, I conclude and find on a fair preponderance of the evidence that Ed May possessed the authority to carry out such actions; and that all of these indicia of supervisory authority possessed and exercised by May, affected matters relating to the employment relationship of hiring, firing, direction, supervision, and other conditions subject to mandatory collective bargaining of G. Wes' employees. *American Air Filter Co.*, 258 NLRB 49 (1981).

I also find that by asking employee Richard Poe to testify in the instant Board proceeding on behalf of G. Wes (May), Environmental Tech was apparently recruiting employee witnesses on behalf of G. Wes to testify on behalf of G. Wes. I find such conduct by Environmental Tech (May) does not cast Environmental Tech in the posture of a separate and single entity, operating independently of Respondent G. Wes.

Thus, I further find on the foregoing evidence that Respondent Environmental Tech, through its Polsky project supervisor, Ed May, possessed and exercised sufficient indicia of control over the employees of Respondent G. Wes to constitute the two entities (G. Wes and Environmental Tech) joint employers within the meaning of the law. *Laerco Transportation*, supra; *United States Steel Corp.*, supra.

Finally, I find on the foregoing evidence and findings that by interrogating Joseph Gray and Leo Saahir about their union affiliation, Respondents G. Wes and Environmental Tech, jointly interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act; that by terminating the employment of Joseph Gray because of his union affiliation, Respondent discriminated against him in regard to tenure of employment, in violation of Section 8(a)(1) and (3) of the Act; and by specifically telling Leo Saahir Respondent was not hiring him because Respondents were not hiring union members because the Union was picketing Respondents' job, and in fact carrying it out, Respondent G. Wes Limited and Respondent Environmental Tech discriminated against Leo Saahir, in violation of Section 8(a)(1) and (3) of the Act.

Even if Respondent Environmental Technology and Respondent G. Wes Limited were not found to have joint employer status, I, nevertheless, would find that Respondent Environmental Technology separately and independently violated the Act as herein described.

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices I will recommend that they be ordered

to cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents interrogated their employees about their union affiliation, Respondents have interfered with, restrained, and coerced their employees in violation of Section 8(a)(1) of the Act; having found that Respondents terminated the employment of their employee because of his affiliation in the Union and the Union's picketing Respondents' jobsite, Respondents have discriminated against their employee, in violation of Section 8(a)(1) and (3) of the Act; and that by refusing to employ an applicant for employment because of his affiliation with the Union, and the union picketing the Respondents' jobsite, the Respondents have discriminated against the employee, in violation of Section 8(a)(1) and (3) of the Act; the recommended Order will provide that Respondents cease and desist from engaging in such unlawful conduct.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondents cease and desist from, in any like or related manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

#### CONCLUSIONS OF LAW

1. Respondent G. Wes Limited is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Environmental Technology is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent G. Wes Limited and Respondent Environmental Technology are joint employers within the meaning of the law.

4. By coercively interrogating employees about their union affiliations, Respondents have violated Section 8(a)(1) of the Act.

5. By discriminatorily terminating the employment of an employee, Respondents have violated Section 8(a)(1) and (3) of the Act.

6. By refusing to employ an applicant for employment because of his union affiliation with the union picketing the jobsite of Respondents, the Respondents have discriminated against the employee, in violation of Section 8(a)(1) and (3) of the Act.

[Recommended Order omitted from publication.]